

ESTTA Tracking number: **ESTTA727742**

Filing date: **02/17/2016**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91217589
Party	Defendant J & N Sales, LLC
Correspondence Address	JAMES A POWER JR POWER DEL VALLE LLP 233 WEST 72ND STREET NEW YORK, NY 10023-2788 UNITED STATES jp@powerdel.com, james_power@verizon.net
Submission	Reply in Support of Motion
Filer's Name	James A Power Jr
Filer's e-mail	jp@powerdel.com
Signature	/jpower/
Date	02/17/2016
Attachments	Motion Compel Reply 2.pdf(45673 bytes) Power Decl Reply 2.pdf(31262 bytes) Exh K.pdf(696624 bytes) Exh L.pdf(44032 bytes) Exh M.pdf(93231 bytes) Exh N p1-3.pdf(43274 bytes) Exh N p4.pdf(1841966 bytes) Exh N p5.pdf(342167 bytes) Exh N p6.pdf(364842 bytes)

UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK TRIAL AND APPEAL BOARD

RHYTHM HOLDING LIMITED,

Opposer,

v.

J & N SALES, LLC,

Applicant.

)
) Opposition No. 91-217589
)

) In the Matter of:

) Application No. 86/050,581
)

) Mark: RHYTHM IN BLUES
)

) Attorney Ref. 256.612

APPLICANT’S REPLY IN SUPPORT OF ITS MOTION TO COMPEL

Applicant J & N Sales, LLC submits this reply and declaration in support of its motion to compel opposer to disclose information concerning its acquisition of the marks asserted in this proceeding, including its and its related predecessors’ due diligence and other assessment of their scope, documents concerning the identification of its target markets and channels of trade, and documents concerning opposer’s objections to third party uses and applications to register marks comprising “Rhythm,” including its terms of settlement and co-existence agreements, including particularly those concerning its assessment of avoiding confusion based upon mode of using the marks and restrictions on target markets and channels of trade.

Opposer is apparently of the view that it is more important to repeat verbatim the requirement of Rule 2.102(e)(1) that a “good faith effort” has been made than to actually make such an effort. Applicant’s counsel set forth in a declaration the efforts made, including those cooperative efforts between the parties, made since the denial of applicant’s first motion on the same procedural grounds that opposer raises here, that winnowed the issues enroute to applicant’s second, extant motion, required by a failure to resolve some remaining issues.¹

¹ Opposer, in its counsel’s correspondence (Reply Decl., ¶ 2, Exhibit K), correctly recognized that applicant was mistaken in its belief that this motion to compel was due to be filed before the end of the discovery period, which explains its expedition (see motion, p. 2).

Since applicant's motion was filed, it has continued its efforts to secure the cooperation of opposer in resolving what would be an overstatement to refer to as issues – there does not seem to be any legal or rational basis for opposer's recalcitrance.

While opposer presumes an improper motive on the part of applicant to delay this proceeding, its history clearly demonstrates that opposer has made no effort to cooperate in discovery until applicant moves to compel and then an order, though denying applicant's motion on opposer's procedural grounds or deprived of that opportunity when applicant changes its position after the motion is made, in helpful *dicta* informs opposer's future conduct in discovery.

Opposer fails to disclose that its "four e-mail requests for a telephone conference" (opposition, p. 3) began on a Sunday and continued, unnecessarily on a daily basis, until applicant's counsel tentatively agreed to a conference schedule. Reply Decl. ¶ 2, Exhibit K). It soon became clear, however, that opposer's counsel was interested only in continuing his rash incivility toward applicant's counsel, which clearly would not have been at all productive, rather than discussing the issues on rational terms.²

Opposer's effort (Opposition at 5, Part IV) to escape the professional responsibility imposed upon it by the Board, having instituted fifteen TTAB proceedings on its mark, by now to be sufficiently prepared to respond to applicant's discovery, is itself an irresponsible endeavor. Those prior proceedings, as well as this one, must not only have been commenced

Notwithstanding that expediency, the required written statement was submitted with the motion, describing in substance the efforts made on behalf of both parties long before the latest suspension was lifted and this motion filed. Opposer recognizes those efforts in its opposition, p.3. Just because opposer revised its responses twice does not mean that no issues remain.

² Applicant's counsel postponed the telephone conference on the heels of advice from opposer's counsel that a focus of his agenda would be his characterization of applicant's copending motion as "bogus" (Reply Decl. ¶ 3, Exhibit L), repeated in his opposition at p.6 along with characterizations of his adversary's positions as "gibberish" and "nonsensical." Prior to that advice, opposer's counsel had habitually framed the discussion in terms of "gibberish" (in his January 14 letter, Exhibit 5 to opposer's copending motion to compel), and requests merely objected to as "incomprehensible." A conversation of that ilk would have done nothing to advance the issues and was better left to applicant's January 7 letter and the correspondence that followed (Opposer's Exhibit 6; Reply Decl. ¶ 4, Exhibit M). Opposer has not responded.

upon due diligence supporting the claims, but also have prepared opposer to respond to one of the three subjects of this motion – documents concerning the settlement of those proceedings and bearing upon the strength of opposer’s mark, the scope of its market and channels of trade. Opposer’s complaint that little or less discovery may have been demanded in the prior cases has no bearing on the proper scope of discovery sought herein.

Further correspondence between counsel regarding applicant’s interrogatory 7 (Reply Decl. ¶ 5, Exhibit N) reveals a coyness on the part of opposer, as does its opposition at 6, exploiting applicant’s good faith effort to explain and otherwise narrow its scope apparently by finding (though it has not disclosed what) some subjective semantic twist that it believes justifies its denial of the existence of any such documents, a contention the record belies. A vast amount of opposer’s production, especially its advertising and promotion, points to a deliberate targeting of a narrow youth surf market and attendant channels of trade the opposer now denies any internal documents address. Its contention is incredible. And it has not been redeemed by any explanation of how opposer might be exploiting applicant’s accommodation. Opposer’s conduct in this regard leaves no mystery why applicant has drafted its discovery to be so carefully inclusive – opposer either complains of the “sweeping” scope of discovery requests or denies them of any response when permitted to construe more narrowly. This is not the reasonable approach to discovery contemplated in Rule 2.120(e)(1) and the TBMP.

Given these circumstances, it may be wise again to proceed on these motions in the spirit of supervised discovery, much as the Board has done by providing advice in its previous orders that informed the parties’ conduct in view of their counsel’s frustrations.

Respectfully submitted,

New York, New York
February 17, 2016

/jpower/
James A. Power Jr
POWER DEL VALLE LLP
233 West 72nd Street
New York, New York 10023
212-877-0100
jp@powerdel.com

Certificate of Service

I hereby certify that, on February 17, 2016, a copy of the foregoing Reply in support of Applicant's Motion to Compel was served upon opposer's counsel of record by first class mail, postage prepaid, in an envelope addressed to:

John L. Welch, Esq.
Wolf Greenfield & Sacks. P.C.
600 Atlantic Ave.
Boston, MA 02210-2211

/jpower/
James A. Power Jr

UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK TRIAL AND APPEAL BOARD

RHYTHM HOLDING LIMITED,)	
)	Opposition No. 91-217589
Opposer,)	
)	In the Matter of:
v.)	
)	Application No. 86/050,581
J & N SALES, LLC,)	
)	Mark: RHYTHM IN BLUES
Applicant.)	

REPLY DECLARATION

JAMES A. POWER JR declares under penalty of perjury that the following statements are true and correct to the best of his knowledge and belief.

1. I am counsel for applicant J & N Sales LLC in this opposition proceeding and submit this declaration in further support of its second motion to compel the production of documents and interrogatory answers from opposer.

2. Submitted with this declaration as Exhibit K is a series of e-mails from opposer's counsel between January 10 and 13, 2016, demanding that a time and date be scheduled for a telephone conference, and a January 13 response from opposer's counsel seeking confirmation of an agenda addressing the concerns of both parties.

3. Submitted with this declaration as Exhibit L is a series of e-mails exchanged between January 14 and 19, 2016 whereby applicant's counsel tentatively scheduled a telephone conference with his adversaries regarding the parties' discovery disputes and an agenda was discussed into which opposer's counsel interjected his continued incivility, to which applicant's counsel responded by requesting a postponement of the conference in favor of continuing the progress made by written correspondence.

4. Submitted with this declaration as Exhibit M is a January 27, 2016 sent to opposer's counsel representing further effort on the part of applicant to resolve the outstanding discovery disputes. Opposer has not responded to this letter nor that of January 25 (Opposer's Exhibit 6).

5. Submitted with this declaration as Exhibit N is a series of e-mails exchanged on January 20, 2016 whereby opposer's counsel, in response to applicant's January 7 letter (Exhibit J), disingenuously denies the existence of documents responsive to applicant's interrogatory 7 regarding opposer's target markets, along with the sample document from opposer's production that belies counsel's contention. Opposer declined to address the issue further.

The undersigned being warned that willful false statements and the like are punishable by fine or imprisonment, or both, under 18 U.S.C. 1001, and that such willful false statements and the like may jeopardize the validity of the application or document or any registration resulting therefrom, declares that all statements made of his/her own knowledge are true; and all statements made on information and belief are believed to be true.

February 17, 2016

/jpower/
James A. Power Jr

Subject: RE: Rhythm v. J&N Sales

From: "John L. Welch" <John.Welch@WolfGreenfield.com>

To: James A. Power Jr <jp@powerdel.com>

Cc: Will Maguire <paliesq@gmail.com>

Wed, 13 Jan 2016 16:02:22 +0000

You did not confirm a date and time.

Please advise.

My suggestion is Thursday, Jan. 21, at 2pm EST.

JLW

John L. Welch

Wolf, Greenfield & Sacks, P.C.

600 Atlantic Avenue

Boston, MA 02210

direct: 617-646-8285

From: James A. Power Jr [jp@powerdel.com]

Sent: Wednesday, January 13, 2016 10:31 AM

To: Welch, John L.

Subject: RE: Rhythm v. J&N Sales

I received you emails. Relax. You are on vacation.

It has been over a year since applicant responded to opposer's initial discovery and, frankly, I don't see how you can allege a good faith effort to resolve any remaining issues at this late date, having ignored them for so long.

More importantly, I have never received a response from you to my several requests that we resume the settlement discussions had with Mr. Maguire.

While I understand that you would like to schedule a telephone call with me to discuss what we have most recently identified as opposer's remaining disclosure obligations (which we have diligently pursued and made progress albeit, from opposer, solely in response to our motions that, though avoided on dubious procedural grounds, resulted in advisory orders from the Board urging opposer's compliance), as well as applicant's objections, I think it would be worthwhile to address settlement then as well. What do you say? Please provide an agenda for our discussion or refer to previous correspondence outlining the same, if still current.

Hope you are some where warm and(/or) having a good time.

James A. Power Jr
Power Del Valle LLP
233 West 72 Street
New York, New York 10023
212-877-0100
fax 212-580-0325
jp@powerdel.com
<http://www.powerdel.com>

Confidential and privileged. This communication is intended only for the addressee(s) identified above. If you are not an intended recipient of this communication, you are hereby notified that you must not use, disseminate or copy it in any form or take any action in reliance on it. If you have received this communication in error, please delete it and all copies from your e-mail server and immediately notify the sender, Power Del Valle LLP, at an address shown above. This communication may contain confidential, proprietary or legally privileged information that binds the recipient to nondisclosure. Neither confidentiality nor any privilege is intended to be waived or lost by any error in transmission.

Nothing communicated in response to an unsolicited e-mail or in the absence of a formal, written engagement may be relied upon as legal advice nor as establishing an attorney-client relationship.

Subject: RE: Rhythm v. J&N Sales

From: "John L. Welch" <John.Welch@WolfGreenfield.com>

To: James A.Power Jr <jp@powerdel.com>

Cc: Will Maguire <paliesq@gmail.com>

Wed, 13 Jan 2016 12:39:04 +0000

Third attempt.

Please let us have your response.

JLW

John L. Welch

Wolf, Greenfield & Sacks, P.C.

600 Atlantic Avenue

Boston, MA 02210

direct: 617-646-8285

From: Welch, John L.

Sent: Tuesday, January 12, 2016 7:35 AM

To: James A.Power Jr

Cc: Will Maguire

Subject: RE: Rhythm v. J&N Sales

Re-sending.

May we please have a response?

Thank you.

JLW

John L. Welch

Wolf, Greenfield & Sacks, P.C.

600 Atlantic Avenue

Boston, MA 02210

direct: 617-646-8285

From: Welch, John L.

Sent: Sunday, January 10, 2016 8:09 AM

To: James A.Power Jr

Cc: Will Maguire

Subject: RE: Rhythm v. J&N Sales

Dear Mr. Power.

I am on vacation until January 18th.

We would like to have a telephone discussion regarding your client's discovery responses, including not only its most recent responses, but all of them. I am available on Thursday afternoon, January 21st. Please let me know whether that date is convenient.

I note that you filed a motion to compel on Friday, January 8, again without making a good faith effort to resolve the disputed issues. Apparently you acted precipitously because you were under the mistaken impression that motions to compel have to be filed before the close of discovery. That is in correct.

We will be prepared to discuss the issues involved in your motion in the same January 21st telephone discussion.

Given your client's position on opposer's discovery requests, please recognize the the purpose of the January 21st telephone conference is to satisfy the good faith requirement of the Trademark Rules preliminary to opposer's filing of any necessary motion to compel.

Very truly yours,

JLW

John L. Welch

Wolf, Greenfield & Sacks, P.C.

600 Atlantic Avenue

Boston, MA 02210

direct: 617-646-8285

Subject: RE: Rhythm v. J&N Sales
From: James A. Power Jr <jp@powerdel.com>
To: John L. Welch <John.Welch@WolfGreenfield.com>
Tue, 19 Jan 2016 12:07:37 -0500

Dear Mr. Welch:

Unfortunately, I will not be available to join in a conference call with you this Thursday, notwithstanding your kind remarks below. In the meantime, as promised, I will respond to your recent letter in writing this week, clarifying applicant's objections and seeking support for opposer's requests, in an effort to bring the two sides closer together. I would encourage your written reply to the same ends.

Thank you for seeing the error in my message below. Indeed, I was referring to opposer's 2014 discovery.

I find it difficult to understand how the Board's suspension of the filing of papers not germane to applicant's motions in any way hindered opposer's non-existent efforts over the past year to resolve between counsel any that might remain of its early disputes regarding applicant's objections. A reasonable assessment of this lack of resolve on the part of opposer is either that it had by now abandoned its positions, just as it had so readily abandoned its initial interrogatory objections in response to applicant's first motion to compel, or that it had deemed the issues resolved.

Your advice that opposer has no plans to disclose, in response to long outstanding discovery requests and a more recent letter merely advising that your client may have overlooked some important categories and documents in its disclosures, may be yet another example of opposer's inability to cooperate in discovery until applicant moves to compel, whereupon opposer swiftly abandons its positions. If that is to be the case, you might advise your client to disclose those matters directly, as the Board has already recognized their ready availability (which is why I encouraged you to read applicant's motion now, rather than solely in opposing it again on procedural grounds), thus obviating the Board's consideration once again of what will become another of opposer's transient objections.

Thank you again for your letter, to which I look forward to responding shortly. We also look forward to your settlement proposal and substantive response to our January 7 letter.

Regards,

James A. Power Jr
Power Del Valle LLP
233 West 72 Street
New York, New York 10023
212-877-0100
fax 212-580-0325
jp@powerdel.com
<http://www.powerdel.com>

Confidential and privileged. This communication is intended only for the addressee(s) identified above. If you are not an intended recipient of this communication, you are hereby notified that you must not use, disseminate or copy it in any form or take any action in reliance on it. If you have received this communication in error, please delete it and all copies from your e-mail server and immediately notify the sender, Power Del Valle LLP, at an address shown above. This communication may contain confidential, proprietary or legally privileged information that binds the recipient to nondisclosure. Neither confidentiality nor any privilege is intended to be waived or lost by any error in transmission.

Nothing communicated in response to an unsolicited e-mail or in the absence of a formal, written engagement may be relied upon as legal advice nor as establishing an attorney-client relationship.

----- Original Message -----

From: "John L. Welch" <John.Welch@WolfGreenfield.com>
To: "James A. Power Jr" <jp@powerdel.com>
Cc: "Will Maguire" <paliesq@gmail.com>
Sent: Fri, 15 Jan 2016 21:02:10 +0000
Subject: RE: Rhythm v. J&N Sales

Mr. Power:

I will call you at 2pm on Thursday, November (sic. January) 21st. Mr. Maguire will also be on the call. We note your reference to "last year's" recent discovery, as well as to the "applicant's (sic) 2014 discovery," but we also note your failure to appreciate the unwarranted delays that resulted from your two previous untimely motions to compel and the resultant suspensions of the proceeding.

As to your third untimely motion to compel, we will be opposing that motion on the now-familiar ground of your failure to make a good faith effort to resolve the issues raised. Surely you won't argue that a letter sent on January 7th is a sufficient good faith effort to resolve the issues raised in a motion filed the next day. In addition, opposer will be filing a motion for sanctions based upon your repeated flouting of the Trademark Rules in this regard.

My letter was obviously not intended to respond to your bogus motion. Our response will be filed at the appropriate time. We cannot understand why you say that opposer has no objections to your discovery demands, as you now characterize and re-cast them. Therefore, don't expect that we will be producing any documents before the conference on Thursday. We note your typically snide comment that you "trust" that we have read your motion. If you want to discuss your motion in this context, we will listen on Thursday.

And by the way, I am enjoying my vacation. I trust you have read my letter thoroughly and are enjoying preparing proper responses.

JLW

John L. Welch
Wolf, Greenfield & Sacks, P.C.
600 Atlantic Avenue
Boston, MA 02210
direct: 617-646-8285

From: James A. Power Jr [jp@powerdel.com]
Sent: Thursday, January 14, 2016 5:28 PM
To: Welch, John L.
Subject: RE: Rhythm v. J&N Sales

Dear Mr. Welch:

Thank you for your response and letter outlining opposer's first attempt to resolve applicant's objections to applicant's 2014 discovery in nearly a year and identifying issues with respect to last year's more recent discovery. I will read these and respond, hopefully in ways that will advance the discourse.

While you had said that you would like to discuss the issues raised in applicant's discovery motion as well, I did not see that addressed in your letter. Please address that at your earliest convenience, as you have identified no issues with producing the documents sought -- I am aware of no legal objections having been asserted by opposer. I would, therefore, expect that you could provide a schedule for production, or even produce them by the time of our conference. I trust you have read applicant's motion.

In the meantime, let's pencil in your proposed date and time and each try to make some progress as it approaches so that the time can be utilized productively.

Please do not regard me as having ignored you. I responded to the first of your three daily e-mails within two business days of having received it. Your interim e-mails were unnecessary, and your subsequent merely expressed unwarranted dissatisfaction with my response to your first.

Please try to enjoy the remainder of your vacation.

Regards,

James A. Power Jr
Power Del Valle LLP
233 West 72 Street
New York, New York 10023
212-877-0100
fax 212-580-0325
jp@powerdel.com
<http://www.powerdel.com>

Confidential and privileged. This communication is intended only for the addressee(s) identified above. If you are not an intended recipient of this communication, you are hereby notified that you must not use, disseminate or copy it in any form or take any action in reliance on it. If you have received this communication in error, please delete it and all copies from your e-mail server and immediately notify the sender, Power Del Valle LLP, at an address shown above. This communication may contain confidential, proprietary or legally privileged information that binds the recipient to nondisclosure. Neither confidentiality nor any privilege is intended to be waived or lost by any error in transmission.

Nothing communicated in response to an unsolicited e-mail or in the absence of a formal, written engagement may be relied upon as legal advice nor as establishing an attorney-client relationship.

----- Original Message -----

From: "John L. Welch" <John.Welch@WolfGreenfield.com>
To: "James A. Power Jr" <jp@powerdel.com>
Cc: "Will Maguire" <paliesq@gmail.com>
Sent: Thu, 14 Jan 2016 15:07:27 +0000
Subject: RE: Rhythm v. J&N Sales

Dear Mr. Power:

Please see the attached letter.

We look forward to your response regarding a time and date for the telephone conference.

Very truly yours,

John L. Welch
Wolf, Greenfield & Sacks, P.C.
600 Atlantic Avenue
Boston, MA 02210
direct: 617-646-8285

POWER DEL VALLE LLP
COUNSELLORS AT LAW
233 WEST 72 STREET
NEW YORK, NEW YORK 10023

JAMES A. POWER JR. ◊
MARGUERITE DEL VALLE
◊ also admitted California

TELEPHONE 212-877-0100
FACSIMILE 212-580-0325
jp@powerdel.com

January 27, 2016

0256.612

john.welch@wolfgreenfield.com

John L. Welch, Esq.
Wolf Greenfield & Sacks. P.C.
600 Atlantic Ave.
Boston, MA 02210-2211

Re: RHYTHM IN BLUES - Opposition 91-217589

Dear Mr. Welch:

I write in response to your January 14, 2016 letter regarding applicant's objections to opposer's November 11, 2014 discovery. Applicant objected to that discovery on December 31, 2014. The last applicant heard from opposer as to any issues it may have had with applicant's responses was by your letter of February 20, 2015, briefly referring to the points made in a January 21, 2015 letter from your co-counsel, to which we had responded by letter of January 30, 2015. I replied to your letter on March 9, 2015 and received nothing further from you.

It thus has been over a year since applicant responded to opposer's initial discovery. I don't see how you can allege a good faith effort to resolve any remaining issues at this late date, having ignored them for so long. A reasonable assessment of this lack of resolve on the part of opposer is either that it had by now abandoned its positions, just as it had so readily abandoned its initial interrogatory objections in response to applicant's first motion to compel, or that it had deemed the issues resolved.

In any event, your new and renewed arguments regarding opposer's interrogatories 2 and 10 and requests 2 and 3 are without support. While a factor in determining likelihood of confusion is, indeed, actual confusion, I am aware of no theory of likelihood of actual confusion. Whether applicant filed under section 1(a) or 1(b), the scope of this proceeding is limited to the listing of goods in the opposed application and asserted registrations, and opposer's use of its mark. If you have any support for your position, please supply it. Regarding your remaining comments, please advise where and when the statements to which you refer regarding production were made. It may be that the documents already have been produced.

We look forward to your settlement response.

Very truly yours,



James A. Power Jr

c: William E. Maguire, Esq.

Subject: RE: Rhythm v. J&N Sales
From: James A. Power Jr <jp@powerdel.com>
To: John L. Welch <John.Welch@WolfGreenfield.com>
Wed, 20 Jan 2016 19:26:46 -0500

Are you saying that opposer's 780 is not such a document (and, if so, on what basis and how), or are you denying it exists? There are others. Given what we have and know from opposer's records and conduct, unless your client can attest to a reasonable search, you would seem to be jeopardizing your credibility. So I hope (lest I say "trust") this is not your complete answer to my effort to settle this dispute. I will await your explanation.

----- Original Message -----

From: "John L. Welch" <John.Welch@WolfGreenfield.com>
To: "James A. Power Jr" <jp@powerdel.com>
Cc: "Will Maguire (paliesq@gmail.com)" <paliesq@gmail.com>
Sent: Wed, 20 Jan 2016 22:26:16 +0000
Subject: RE: Rhythm v. J&N Sales

Question: Are you representing that no documents exist that address this market targeting?
Answer: yes.

John L. Welch
Counsel
jwelch@wolfgreenfield.com
direct dial: 617.646.8285
Wolf, Greenfield & Sacks, P.C.
600 Atlantic Avenue | Boston, MA 02210-2206
617.646.8000 | 617.646.8646 fax

Please consider the environment before printing this email.
For more information about Wolf Greenfield, please visit us at www.wolfgreenfield.com
This e-mail message and any attachments may contain confidential or privileged information. If you are not the intended recipient, please notify me immediately by replying to this message and destroy all copies of this message and any attachments. Thank you.

From: James A. Power Jr [mailto:jp@powerdel.com]
Sent: Wednesday, January 20, 2016 5:24 PM
To: Welch, John L.
Subject: Re: Rhythm v. J&N Sales

John -

During the course of settlement discussions with Mr. Maguire, he proposed on behalf of opposer, and we accepted, channels of trade limitations carving out from applicant's description of goods what opposer deemed to be its target market:

" . . . none of which shall be marketed to the active youth apparel consumer that includes surf apparel, skateboard apparel, snowboard apparel and related streetwear."

Are you representing that no documents exist that address this market targeting? Are you construing a word or more of mine either narrowly, if used to identify the matters sought in the interrogatory, or broadly, if used to narrow the request in good faith by excluding the many advertisements that merely depict or suggest such targeting, so as to arrive at your response? If so, please identify them specifically and how you may be construing them apart from their ordinary meanings. Scattered documents already produced

by opposer, e.g., no. 780, fall within these categories, so they do exist. We are asking that your client conduct a document search directed to our request, whereupon further documents, if not an entire devoted file or group of employees, will likely be found.

In my January 7 letter, I merely repeated my prior explanations and suggested you simply read the word "by" out of the first line of the interrogatory. The interrogatory was similarly construed for you as long ago as our June 11 reply in support of the first motion to compel and again in a September 28 e-mail.

As to your objection below, it is my understanding from a reading of your client's notice of opposition that opposer is alleging a likelihood of confusion based not only on its asserted registrations but its prior use in commerce. That use and the markets and channels of trade targeted and followed by opposer would thus be relevant, unless opposer would like to disclaim that basis of confusion by amending its notice.

Please advise.

Yours,

James A. Power Jr
Power Del Valle LLP
233 West 72 Street
New York, New York 10023
212-877-0100
fax 212-580-0325
jp@powerdel.com
<http://www.powerdel.com>

Confidential and privileged. This communication is intended only for the addressee(s) identified above. If you are not an intended recipient of this communication, you are hereby notified that you must not use, disseminate or copy it in any form or take any action in reliance on it. If you have received this communication in error, please delete it and all copies from your e-mail server and immediately notify the sender, Power Del Valle LLP, at an address shown above. This communication may contain confidential, proprietary or legally privileged information that binds the recipient to nondisclosure. Neither confidentiality nor any privilege is intended to be waived or lost by any error in transmission.

Nothing communicated in response to an unsolicited e-mail or in the absence of a formal, written engagement may be relied upon as legal advice nor as establishing an attorney-client relationship.

----- Original Message -----

From: "John L. Welch" <John.Welch@WolfGreenfield.com>
To: "jp@powerdel.com" <jp@powerdel.com>
Cc: "Will Maguire (paliesq@gmail.com)" <paliesq@gmail.com>
Sent: Wed, 20 Jan 2016 14:12:39 +0000
Subject: Rhythm v. J&N Sales

Dear Mr. Power:

We are reviewing your letter of January 7 with the hope of putting to rest the issues raised therein so that this case may proceed to the testimony periods without further delay. As previously indicated, we will file an opposition to your motion to compel, if necessary.

In one part of your letter of January 7, 2016, you addressed Opposer Rhythm's objection to Applicant's Interrogatory No. 7, which interrogatory we found to be incomprehensible. You now say that the interrogatory "seeks documents concerning opposer's target market and how it defines that market in terms of demographics, consumer behavior, etc." You go on to say that Opposer "may limit its scope to the planning, strategic marketing, promotion and other documents that directly discuss or define those target market criteria."

Now that we have clarification of what Applicant was attempting to request, Opposer responds as follows: Opposer objects to this request on the ground that it seeks documents that are not relevant to the subject matter of this proceeding and are not likely to lead to the discovery of admissible evidence. Neither the pleaded registrations nor the opposed application include any limitations as to classes of consumers or price points or other such demographic character. Furthermore, and without waiving the above-stated objection, Opposer states that it has no such documents. We will be addressing the remainder of your letter shortly.

Very truly yours,

John L. Welch

John L. Welch
Counsel
jwelch@wolfgreenfield.com
direct dial: 617.646.8285
Wolf, Greenfield & Sacks, P.C.
600 Atlantic Avenue | Boston, MA 02210-2206
617.646.8000 | 617.646.8646 fax

Please consider the environment before printing this email.

For more information about Wolf Greenfield, please visit us at www.wolfgreenfield.com
This e-mail message and any attachments may contain confidential or privileged information. If you are not the intended recipient, please notify me immediately by replying to this message and destroy all copies of this message and any attachments. Thank you.

Rhythm offers surf-retailers and their customers a fresh, design driven alternative in an increasingly homogenized market place.

The grass-roots, family run boardshort brand has created a sensation in Australia with it's fun, art-based designs, quality tailoring and craftsmanship and creative marketing.

Rhythm speaks to surfers who still regard the art of wave riding as creative self-expression, who yearn for new frontiers over the well worn path.

With over 60 years and two generations of surf and garment industry experience, Rhythm brings together a unique group of talented designers, artists, surfers and musicians with a shared dream of creating a livelihood doing what they love, drawing influences from the worlds of surf, art and music past, present and future.

Rhythm also have a dedicated Product Development Facility (Rhythm PDF) in Shen Zhen, China. This facility is managed by Peter Grey. Coupled with Peter's 40 years of tailoring and production experience, this facility allows us to get our designs to market quickly and efficiently. We can react to market demands and provide our customers with designs that are constantly ahead of the curve.





GOING GLOBAL

Rhythm in the U.S.A

Rhythm launched onto the US market at the Action Sports Retailer trade show in 2008. The initial response was enthusiastic, with US retailers loving Rhythm's fresh designs, colour and cut.

Key accounts such as Sun Delgo, Huntington Surf and Sport (HSS) and ZJ's at Venice Beach were part of 25 new accounts who snapped up that first Spring collection. The momentum continued into Summer 2009, which saw those Spring sales doubled.

With a new management structure in place to solidify the supply chain, and new office and warehouse HQ purchased in Irvine,

Rhythm has made a strong statement about being in the US for the long haul.

New markets in Central and South America have been opened up, introducing even more customers to the Rhythm range.

New design and sales staff have invigorated the brand, opening up even more, new distribution channels, and striking up innovative marketing opportunities through the web, media placements and creative arts and events. Rhythm is ideally positioned now to claim a large and growing market share in the US.



EVOLUTION OF THE BRAND

The Sound Of Change

As Rhythm launched in Australia, surf retail was in a slump and retailers were retreating to the supposed "safety" of the major brands, meaning less choice and variety in the market and a bunch of surf shops that all looked the same.

Ironically, really, since the surf wear slump was largely due to young consumers switching on consumers looking for a point of difference in an increasingly homogenised marketplace.

By mid-2005 Rhythm had begun to make solid inroads and many forward-thinking retail-

ers were enjoying the buzz and resultant profits generated by offering their customers a creative new option.

Others, however, who had grimly stuck with the majors claimed they were enduring their worst summer in 20 years. Many such outlets vowed to stick with the big brands rather than take a risk, even as racks full of big brand product sat in their shops heavily discounted.

Meanwhile, stores who had taken the leap of faith with Rhythm were dancing to the Sound of Change ...